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In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HERTZKA & KNOWLES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

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v.

HERTZKA & KNOWLES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-14a) is reported at 503 F. 2d 625. The decision and order of the Board (Pet. App. D, pp. 21a-59a) are reported at 206 NLRB 191.

JURISDICTION

The Board's timely petition for rehearing was denied on April 2, 1975 (Pet. App. B, p. 15a), and the judgment of the court of appeals was entered on April 9, 1975 (Pet. App. C, pp. 16a-20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that committees to consider collective bargaining subjects are not freely chosen by the employees to be their labor organization where the employer participates in their formation and operation, and where they are formed immediately after an independent union has been rejected in an election that the employer has improperly influenced.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 8 (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

STATEMENT

A. The Board's Findings of Fact

In September 1971, pursuant to a representation election, the Board certified the Organization of Architectural Employees, Local 2001, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (OAE) as the bargaining representative of the architectural employees of Hertzka & Knowles (the Company), a firm of architects. The Company and OAE then negotiated for about 14 months, but were unable to arrive at a collective agreement. (Pet. App. D, p. 28a.)

Early in November 1972, an employee filed with the Board a petition for a decertification election (*ibid.*). In the ensuing election campaign, a series of lunch hour meetings was attended by most of the unit employees and several company officials (*ibid.*). At the first meeting, held on November 13, Peter Ekstein, OAE's executive secretary, presented OAE's position (Pet. App. D, pp. 28a-29a). On November 15, three architects from the San Francisco office of Skidmore, Owings, and Merrill (SOM) discussed the representation system there; they indicated that a "Policy Council" had been established after OAE had lost a representation election as "an alternative to

union representation" (*id.* at 29a; Tr. 89).[1] On November 29, Company Vice President George Hanna reviewed OAE's contract proposals and argued against union representation (Pet. App. D, p. 30a). Finally, on December 1, a meeting to present management's position was held. Virtually all of the employees as well as the two senior partners, Wayne Hertzka and William Knowles, and Vice Presidents Tobin, Hanna, and Stolte attended (Pet. App. D, p. 30a; Tr. 49, 95, 301).

At the December 1 meeting, Vice President Tobin told the employees that: "We could set up a policy council at Hertzka and Knowles similar to that at Skidmore, and that it would be a more suitable alternative to the union, and we could deal with the problems wholly within the office without any outside assistance" (Pet. App. D, p. 31a; Tr. 79, 55, 95). Tobin, Stolte, and Hertzka also made statements at the meeting indicating that if the office were known to be unionized it would be harder for the firm to get work, the staff would have to be reduced, and it would be harder for them to find work if they came from a union office (Pet. App. D, pp. 31a-32a, 36a). Knowles indicated that he and Hertzka could close the office down rather than "worry about this stuff" (Pet. App. D, pp. 34a-35a; Tr. 224-225).

On December 6, the Board conducted a decertification election at the Company's offices, which OAE

[1] During discussion of the SOM system, Company Vice President Tobin asked, "Don't you think the Policy Council can achieve at Hertzka and Knowles what the Union can achieve?" (Pet. App. D, pp. 29a-30a; Tr. 37, 81, 218).

lost by a vote of 11 to 14 (Pet. App. D, p. 43a). Immediately after the election, Vice President Hanna announced to the employees that he was calling a meeting for the next morning and that management was "going to put its money where its mouth was" (*ibid.*; Tr. 105, 193).

The next morning, all of the employees met with Hertzka, Knowles, Hanna, Tobin, and Stolte in the Company's drafting room (Pet. App. D, p. 43a; Tr. 106, 194). Hanna chaired the meeting, which he opened by telling the employees that "it was evident from the results [of the election] that [the employees] had chosen not to go the union route. However, [Hanna] also felt that the eleven votes in favor of the Union had to be taken into account" (Pet. App. D, p. 43a; Tr. 107-108, 167, 194). Hanna said that management was "seeking a dialogue," so that problems between management and employees could be resolved. He asked for "proposals or suggestions" as to how this could be accomplished. (Pet. App. D, p. 43a; Tr. 108.)

An employee, Dennis Smith, thereupon suggested the establishment of a committee structure "similar to what they had at SOM".[2] The suggestion was approved by a vote of the employees, whereupon an

[2] The proposal provided for 5 committees, each with 5 employee members (so that each of the 25 employees would serve on a committee) and a management member. The 5 committees suggested were: (1) Professional Stature with the Firm; (2) Remuneration for Professional Services; (3) Minimum Standards of Professional Employment; (4) Efficiency Committee; and (5) Environmental Committee.

employee suggested that the management representatives should vote too. On the second vote, approval of the scheme was unanimous (Pet. App. D, pp. 43a-45a). After the vote was taken, Hanna said: "Well now, let's do it" (Pet. App. D, pp. 45a-46a; Tr. 201, 234-235).

That afternoon, the employees were placed, so far as possible, on the committee of their choice. After the employee complement of each committee was determined, Smith, with the help of two other employees, designated a management representative for each committee. Having completed the full committee complement, Smith took the list of names for each committee to Hanna and asked if it met with his approval. Hanna glanced at the list and said, "That's fine." Each management representative was then approached by Smith to determine if he was satisfied with his committee assignment, and each agreed to serve. (Pet. App. D, p. 46a; Tr. 203-205.)

The management representative took an active part on the committee, and had the same rights as other members of the committee, but could not be committee chairman. If something was resolved in the committee, the management member of that committee was required to take the resolution to the remainder of management for its approval. Committee meetings were held on lunch time or on company time without loss of pay, and were usually held on company premises. The employees paid no dues to the committees, which had no means of support other than that furnished by the Company. (Pet. App. D, pp. 46a-47a; Tr. 111-116, 207-210.)

B. The Board's Decision and Order

Upon charges filed by OAE, the Board found that the Company had violated Section 8(a)(1) of the Act by threatening its employees with blacklisting, layoffs, and business closure if OAE were not decertified, and by suggesting that a Policy Council similar to that at SOM could be established as an alternative to OAE (Pet. App. D, pp. 36a-42a, 54a).[3]

The Board further found that the committee system constituted a labor organization[4] which was dominated and assisted in its formation and administration by the Company, in violation of Section 8(a)(2) and (1) of the Act (Pet. App. D, pp. 48a-50a). The Law Judge, whose decision was adopted by the Board, rejected the Company's contention that it was "merely cooperating with the five committees." He found that the "cooperation" cases cited by the Company (see *infra*, pp. 11-12) were distinguishable "in that the organizations there were not formed in a context of antiunion hostility, the labor organizations were in fact independent and free from

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[3] The Board also found that the Company had interfered with the election and directed that a second election be held (Pet. App. D, pp. 23a-24a, 52a-53a). That election has been postponed pending resolution of the unfair labor practice charges.

[4] See *National Labor Relations Board* v. *Cabot Carbon Co.*, 360 U.S. 203.

employer control and the assistance given was minor and did not destroy the labor organization independence" (Pet. App. D, pp. 50a-51a).[5]

The Board ordered the Company, *inter alia*, to withdraw recognition from and disestablish the committees as the collective bargaining representative of its employees (Pet. App. D, p. 56a).

C. The Decision of the Court of Appeals

The court of appeals upheld the Board's findings that the Company unlawfully threatened its employees with blacklisting, layoffs and shop closure if OAE were retained and enforced its order in that regard (Pet. App. A, pp. 3a-4a).[6]

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[5] Here, in contrast (Pet. App. D, p. 49a):

> the Respondent interfered with the formation of the committee system by its action in suggesting its formation and in calling, presiding at, attending and in voting at a meeting on the committee's establishment and functions. Moreover, management interferes with and dominates the administration of the committee system by virtue of the fact that a management representative is a member of each committee, and attends and takes part in the business of the committee meetings, observes the action and words of the employee members of the committee, votes on action taken by the committees, and observes the votes of others on committee business. Thus, Respondent's management sits on both sides of the bargaining table and frustrates free collective bargaining. * * *

[6] The court apparently rejected, as lacking evidentiary support, the Board's finding that the Company had suggested the establishment of a policy council similar to that at SOM (Pet. App. A, p. 5a, and n. 6). That finding, however, was based on testimony credited by the Law Judge (Pet. App. D, pp. 31a, 36a).

However, the court set aside the Board's findings that the Company had unlawfully dominated and assisted the formation and administration of the committees, and therefore refused to enforce the portions of the Board's order disestablishing the committees as the employees' bargaining representative. Stating that "there is a line between cooperation, which the Act encourages, and actual interference or domination considered from the standpoint of the employees, which the Act condemns" (Pet. App. A, p. 11a), the court concluded that the committee system was unobjectionable because it was "a cooperative arrangement" which "reflects a choice freely arrived at" (Pet. App. A, p. 14a).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals raises an important question concerning the interpretation and application of Section 8(a)(2) of the National Labor Relations Act, which is designed to protect employees' rights to select their own collective bargaining agent. The limitation imposed on this Section by the court below is inconsistent with the purpose of the Act and contrary to decisions of this Court and of other courts of appeals in an area that has increasing significance in light of recent extensions of the Board's jurisdiction.

1. Sections 7 and 9 of the National Labor Relations Act, 29 U.S.C. 157 and 159, guarantee employees freedom of choice in their selection or rejection

of a collective bargaining representative. Section 8 (a) (2) of the Act reflects this basic right by making it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *."[7] From the earliest days of the Act, this Court has recognized that these provisions present "a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence." *International Association of Machinists* v. *National Labor Relations Board*, 311 U.S. 72, 80. The Court has further recognized that, in this specialized area, where "the whole congeries of facts" must be appraised, "Congress entrusted the Board, not the Courts, with the power to draw inferences from the facts." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 588, 597.[8]

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[7] Moreover, Section 8(a) (1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in exercise of the rights guaranteed in section 7."

[8] As the Second Circuit added in *Sperry Gyroscope Co.* v. *National Labor Relations Board*, 129 F. 2d 922, 928:

> Here we have precisely the kind of factual inferences where the specialized judgment of the Board is to be operative according to the Supreme Court. The Board has dealt with scores of cases relating to efforts to show that dominated unions have become "independent"; it knows the typical pattern of such transformations; it has day-to-day contact with the actualities of labor relations in which it must ascertain whether or not "domination" exists.

In *Link-Belt*, the "genesis" of the new inside union "was a suggestion made not by the employer but by a group of employees," and there were such indicia of independence as lack of employer financing, meetings held off company property, and leadership different from that of the old company union (311 U.S. at 587). Nonetheless, this Court, pointing, *inter alia*, to the company's avowed dislike of an outside union coupled with the discharge of two adherents of the outside union (*id.* at 598-599), found "forces at work in the plant which make tenable the conclusion of the Board that the employer had intruded so as effectively to restrain the employees' choice" (*id.* at 598). Similarly, in *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251, the Court held that, where the employer had interfered with the formation and administration of an in-plant committee, the facts that "the Committee had operated to the apparent satisfaction of the employees, * * * the men at an election held under the auspices of the Committee had signified their desire for its continuance, * * * [and] any company interference in the administration of the plan had been incidental rather than fundamental and with good motives" did not preclude a Board finding that the employer had violated the statutory command that "an employee organization shall be free from interference or dominance by the employer."

2. Subsequent to the foregoing decisions by this Court, some courts of appeals have carved out an exception from Section 8(a)(2) for cases of em-

ployer "cooperation." They have held that employer aid which "only assists the employees or their bargaining representative in carrying out their independent intention" is "cooperation" and not unlawful; a finding of unlawful support must involve "at least some degree of [employer] control or influence." *Chicago Rawhide Manufacturing Co.* v. *National Labor Relations Board*, 221 F. 2d 165, 167 (C.A. 7). Accord: *Modern Plastics Corp.* v. *National Labor Relations Board*, 379 F. 2d 201, 204 (C.A. 6); *Federal-Mogul Corp.* v. *National Labor Relations Board*, 394 F. 2d 915, 921 (C.A. 6); *Coppus Engineering Corp.* v. *National Labor Relations Board*, 240 F. 2d 564, 573 (C.A. 1); *National Labor Relations Board* v. *Prince Macaroni Manufacturing Co.*, 329 F. 2d 803, 810-811 (C.A. 1); *National Labor Relations Board* v. *Keller Ladders Southern, Inc.*, 405 F. 2d 663, 667 (C.A. 5). See also Note, *New Standards for Domination and Support under Section 8(a)(2)*, 82 Yale L.J. 510, 519-525 (1973).

3. Under the principles of this Court's earlier decisions (*supra*, pp. 10-11), the court below should have sustained the Board's finding of unlawful support and domination here. The court below, however, held that the case came within the "cooperation" exception. Even if the validity of that exception (which has not as yet been passed on by this Court) is assumed, the holding of the court below would, we submit, extend the exception well beyond the point at which it can be reconciled with the rationale of this Court's decisions and thus would seriously diminish

the protection that Section 8(a)(2) of the Act was intended to provide.

The "cooperation" cases have permitted employers to aid their employees' labor organizations only when it is clear that the employer has not engaged in anti-union activities which may have influenced the employees' choice of the assisted union (see cases cited *supra*). The court below, however, ignored the Company's activities. Considering simply the evidence indicating that the employees had participated actively in establishing the committees after the election in which OAE was rejected, it concluded that the arrangement was unobjectionable under the Act because it "reflects a choice freely arrived at" and one with which there was no evidence of employee dissatisfaction (Pet. App. A, pp. 13a-14a).[9]

Although it agreed with the Board that the Company had committed an unfair labor practice by threatening reprisals if the OAE were not rejected at the December 6 election, the court of appeals failed to consider the significance of that finding on the domination charge under Section 8(a)(2). The com-

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[9] It would be premature to assume employee satisfaction with the procedures, since they are so new that it is not even established whether the management representative on the committee is entitled to a vote (compare Tr. 164, 184, 208, 280). Cf. *Modern Plastics* v. *National Labor Relations Board, supra*, 379 F. 2d at 202, 204. Nor should the court below have found it significant in these circumstances that there was as yet no evidence "of actual interference with the assertion of employee demands through the committees" (Pet. App. A, pp. 13a-14a).

mittee system was proposed and established as a direct result of the rejection of the OAE; since the Company unfairly influenced that rejection, the court was not warranted in concluding, contrary to the Board's finding, that the committee system was indeed the voluntary preference of the employees. At most, the record indicates that the employees may have preferred the committee system to other possible alternatives to the union.[10] The Act does not permit the employer so to circumscribe the employees' choice of bargaining representatives.

4. The decision below is contrary to those of other courts of appeals, which have recognized that where there is a history of antiunion bias or of other unfair labor practices it is improper to conclude that the assisted organization was voluntarily selected by the employees. *Utrad Corp.* v. *National Labor Relations Board*, 454 F. 2d 520, 522-523 (C.A. 7); see *Coppus Engineering Corp.* v. *National Labor Rela-*

[10] The record would also support the alternative inference that here, as in *National Labor Relations Board* v. *Wemyss*, 212 F. 2d 465, 471 (C.A. 9), "the employees formed and supported the [policy committees] rather than [the union], because they knew their employer desired it and feared the consequences if they did not." Wholly apart from the Section 8(a)(1) violation, evidence in support of this view includes the facts that company officials originally suggested the committee system; that the committee system proposal was made immediately after the defeat of the independent union, at a meeting called by management for the avowed purpose of creating an alternative to that union; that the meeting was chaired by management and all members of management were present; and that the employee vote in favor of the committee system was made in full view of management.

tions Board, supra, 240 F. 2d at 573-574, concurring opinion of Chief Judge Magruder; *National Labor Relations Board* v. *Keller Ladders Southern, Inc., supra*, 405 F. 2d at 667; Note, *supra*, 82 Yale L. J. at 528.[11]

5. Because of recent extensions of the Board's jurisdiction to employees of universities and health care institutions,[12] organizational activities by pro-

[11] Moreover, none of the "cooperation" cases has heretofore approved a system which, as here, had no "reasonable claim to being an independent entity composed of employees and distinct from management." *National Labor Relations Board* v. *Ampex Corp.*, 442 F. 2d 82, 85 (C.A. 7); and see *National Labor Relations Board* v. *Dennison Mfg. Co.*, 419 F. 2d 1080, 1085 (C.A. 1). Since there was a management representative on each committee, any formal discussion outside the presence of management was unlikely. Furthermore, once committee proposals were formulated, it was the task of the management representative on the committee to present them to management as a whole for its approval. Thus, not only did the management member participate in employee deliberations, he was also to serve as the employees' chief negotiator. " 'Collective bargaining becomes a delusion and a snare if the employer, either directly or indirectly, is allowed to sit on both sides of the bargaining table * * *.' " *National Labor Relations Board* v. *Stow Manufacturing Co.*, 217 F. 2d 900, 904 (C.A. 2), certiorari denied, 348 U.S. 964, quoting from *American Enka Corp.* v. *National Labor Relations Board*, 119 F. 2d 60, 62-63 (C.A. 4). Accord: *National Labor Relations Board* v. *Mt. Clemens Metal Products Co.*, 287 F. 2d 790, 791 (C.A. 6); see also *National Labor Relations Board* v. *General Shoe Corp.*, 192 F. 2d 504 (C.A. 6), certiorari denied, 343 U.S. 904.

[12] See, *e.g.*, *Cornell University*, 183 NLRB 329; *C. W. Post Center of Long Island University*, 189 NLRB 904; *Wentworth Institute*, 210 NLRB No. 53, enforced, 89 LRRM 2033 (C.A. 1), March 31, 1975; *Mercy Hospitals of Sacramento*, 217 NLRB No. 131, 89 LRRM 1097, May 5, 1975; *Nathan &*

fessional and semi-professional employees will increasingly be a matter of importance to the administration of the Act. Labor organizations of such employees are particularly likely to involve more cooperation with management than is typical of traditional unions (see Note, *supra*, 82 Yale L. J. at 517-518). It is accordingly important for this Court to give renewed consideration to Section 8(a)(2), in light of the "cooperation" cases (developed by the courts of appeals since this Court last addressed the subject), in order to preserve the effectiveness of Section 8(a)(2) in preventing employer interference with the employees' free choice of collective bargaining representatives.

Miriam Barnert Memorial Association d/b/a Barnert Memorial Hospital Center, 217 NLRB No. 132, 89 LRRM 1083, May 5, 1975; *St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.*, 217 NLRB No. 133, 89 LRRM 1070, May 5, 1975.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-2971

HERTZKA & KNOWLES, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

OPINION

[September 18, 1974]

On Petition for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board

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Before: KOELSCH and CHOY, Circuit Judges, and RENFREW,* District Judge.

CHOY, Circuit Judge:

This case arises out of a labor dispute at Hertzka & Knowles, a medium-sized architectural firm located in San Francisco. In September of 1971 its professional employees voted to have the Organization of

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* The Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

Architectural Employees (OAE) as their bargaining agent. After months of negotiations failed to produce an agreement with management, one of the then 25 employees in the bargaining unit petitioned the National Labor Relations Board to decertify OAE. The Board set an election for December 6, 1972.

Prior to the election, management representatives spoke to the employees on several occasions. What occurred at a December 1st meeting formed the basis for OAE charges, filed with the Board after the election, that Hertzka & Knowles violated § 8(a)(1) of the National Labor Relations Act [1] by allegedly making certain threats of reprisal.

OAE lost the election by a vote of 14 against continuing representation and 11 for.

Immediately after the election, a meeting attended by both the employees and the partners of the firm produced a new plan for employee bargaining. It called for five inhouse committees with each to be composed of five employees and one management representative. Each was to have a particular zone of competence—for example, employee remuneration.[2]

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[1] 29 U.S.C. § 158(a)(1). Under that subsection it is an unfair labor practice to "interfere with, restrain, or coerce" employees in the exercise of rights granted them under § 7 of the Act, 29 U.S.C. § 157. Section 7 basically insures the rights to self-organization and to engage in other concerted activity in pursuit of labor goals.

[2] The five committees are: (1) Professional Stature Within the Firm; (2) Remuneration for Professional Services; (3) Minimum Standards; (4) Efficiency; and (5) Physical Environment.

In its charges before the Board, OAE claimed that this committee system violated § 8(a)(2) of the Act which requires that an employer not "dominate or interfere with the formation or administration of . . . or contribute financial or other support to" any labor organization.[3]

The Board agreed, after a hearing before a trial examiner, that the employer had committed the unfair labor practices OAE charged. 206 N.L.R.B. No. 32 (1973). Its order requires Hertzka & Knowles to cease and desist from threatening its employees with reprisals and to withdraw recognition and support from and disestablish the employees' committees. Additionally, the Board set aside the decertification and called for a new election.

Hertzka & Knowles petitions here to set aside, and the Board cross-petitions to enforce, this order insofar as it pertains to the unfair labor practices.[4] We enforce the order as to the alleged threats of

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[3] 29 U.S.C. § 158(a)(2). It provides that it shall be an unfair labor practice for an employer:

> to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board . . . , an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

[4] That part of the order setting aside the election and requiring a new election is not, and could not be, before us. *See Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964); *A.F. of L.* v. *NLRB*, 308 U.S. 401 (1940).

reprisal, but refuse to enforce that part based on the § 8(a)(2) charges.

The § 8(a)(1) Charges

We first consider management's pre-election speeches to the employees. Section 8(a)(1) prohibits employer interference with employee rights of self-organization. Because that prohibition could facially restrict almost any employer opposition to union organization efforts, it is qualified by § 8(c) of the act [5] which, in turn, incorporates First Amendment safeguards. The subsection provides that the "expressing of any views, argument, or opinion, or the dissemination thereof" shall not be evidence of an unfair labor practice "if such expression contains no threat of reprisal or force or promise of benefit." The issue for us is whether Hertzka & Knowles' pre-election statements fall within the class of unprotected threats of reprisal.

The Supreme Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969), provided the standard for distinguishing between protected and unprotected speech. An employer, the Court said, is "free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union" absent a threat. *Id.* at 618.

> He may even make a prediction as to the precise effects he believes unionization will have on his

[5] 29 U.S.C. § 158(c).

> company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to [say] close [a] plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is . . . a threat . . . , and as such without the protection of the First Amendment.

Id. (Citation omitted.)

With this background we turn to the particular speeches which the Board found to contain threats.[6] First, at the December 1st meeting senior partner Knowles spoke to explain how he and Hertzka were transferring ownership of the firm to the junior partners. During the course of explaining this complex scheme, he mentioned that the motivation was the desire to keep the business going; "we could have closed it up, but we didn't." Ekstein, an OAE officer, immediately rose and characterized this as an unlawful threat to shut the firm down should the union win the election. Angered, Knowles advanced on Ekstein and declared that in courting a union, the employees were "playing with a loaded stick of dynamite." After being restrained by Hertzka, Knowles then said in a low-voiced aside to the for-

[6] The findings set forth are those which we find substantial evidence to support.

mer: "Come on Wayne, we don't have to put up with this; we can close down."[7] Because of the commotion, not everyone heard the last remark, but, according to the testimony of employee Dennis Smith, at least several of those in attendance did.

We think that both the "loaded stick" comment and the aside to Hertzka are clearly unprotected by § 8(c) or the First Amendment. These were threats to take action solely within the power of the employer and obviously unbased on any economic predictions.[8] It is not necessary for all the employees to have heard the remarks; as long as some heard, there was a good chance of an impact upon employee free choice.[9] Nor does it matter that it was not intended that others should hear the comments, for it is not only the subjective intent of the speaker that is significant,[10] but also the impact on the employees.

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[7] So the examiner found. Knowles denies saying these things, but other witnesses supported the examiner's version. In the absence of a clear preponderance of all the other evidence, we are bound by the trial examiner's findings of credibility. *E.g., NLRB* v. *Luisi Truck Lines,* 384 F.2d 842, 845-46 (9th Cir. 1967).

[8] *See NLRB* v. *Tom Wood Pontiac,* 447 F.2d 383, 385-86 (7th Cir. 1971); *NLRB* v. *River Togs, Inc.,* 382 F.2d 198, 200-02 (2d Cir. 1967); *Surprenant Mfg. Co.* v. *NLRB,* 341 F.2d 756, 761-62 (6th Cir. 1965).

[9] *See, e.g., NLRB* v. *Clapper's Mfg. Co.,* 458 F.2d 414, 417-18 (3d Cir. 1972).

[10] *See, e.g., NLRB* v. *Kaiser Agricultural Chemicals,* 473 F. 2d 374, 381 (5th Cir. 1973).

Second, at the same meeting Tobin, another management representative, expressed the view that employment at an architectural firm was "transitory" and that "when people leave Hertzka & Knowles in the future and Hertzka & Knowles is a union office, [its] people will be known as union activists and will find it very difficult to secure employment." The examiner found this to be an implied threat to blacklist those supporting the union.

Hertzka & Knowles claims only that it was a true statement of fact based on OAE's poor reputation in the San Francisco architectural community. The dispute is thus purely one over the inference that can be drawn from Tobin's statement—whether a prediction of fact or a threat to blacklist. The general rule is that if more than one inference can be drawn from a given set of facts, the Board's will control unless it is unreasonable.[11] Though we consider the question a close one, we cannot say it is unreasonable to conclude that, in the heat of a decertification campaign, reference to "transitory" employment and the difficulty in finding employment elsewhere are implied threats to blacklist. *See Coca Cola Bottling Co.,* 188 N.L.R.B. 590 (1971).[12]

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[11] *Famet, Inc.* v. *NLRB,* 490 F.2d 293, 295 (9th Cir. 1973); *NLRB* v. *Douglas & Lomason Co.,* 443 F.2d 291, 294 (8th Cir. 1971); *NLRB* v. *Miller Redwood Co.,* 407 F.2d 1366, 1369-70 (9th Cir. 1969); *see NLRB* v. *Holly Bra, Inc.,* 405 F.2d 870, 872 (9th Cir. 1969).

[12] Hertzka & Knowles also argues that the blacklist charge should not be upheld because it was deleted from the charges by the Board's General Counsel. While normally nonenforce-

Third, Tobin went on to remark that if the office "turned union," it would be more difficult to find business due to the reluctance of clients to deal with a unionized architect; this, of course, would mean fewer employees. Hertzka later said much the same thing in slightly more veiled terms. The examiner found these to be implied threats to lay off union supporters.

Again, although we are troubled by this finding, we think there is substantial evidence to support it. The statement constitutes a prediction of economic consequences, but it is not, as required by *Gissel*, one "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *NLRB* v. *Gissel Packing Co.*, 395 U.S. at 618. Hertzka & Knowles produced no evidence of a prospective business slowdown in the event the office remained unionized. In fact, the evidence was to the contrary since the firm's business apparently increased during the 14 months OAE represented the employees. We therefore follow similar cases sustaining unfair labor practices involving unsupported predictions of company slowdown. *See, e.g., Amalgamated Clothing Workers* v. *NLRB*, 424 F.2d 818 (D.C. Cir. 1970).

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ment would seem required, nowhere did the employer object to the admission of evidence on the subject, nor to the variance between charge and findings. If an issue is thus fully tried without contemporaneous objection, the findings will be upheld. *Rogers Mfg. Co.* v. *NLRB*, 486 F.2d 644, 648 (6th Cir. 1973); *Rea Trucking Co.* v. *NLRB*, 439 F.2d 1065, 1066 (9th Cir. 1971); *cf. Golden Grain Macaroni Co.* v. *FTC*, 472 F.2d 882, 886 (9th Cir. 1972), *cert. denied*, 412, 918 (1973).

The § 8(a)(2) Charges—The Committee System

When the results of the decertification election became clear on December 6, Hanna, a partner in the firm, called a meeting of both partners and professional personnel for the next morning. The meeting was opened by Hanna who commented that the eleven pro-union votes indicated a degree of dissatisfaction which had to be taken into account. He then asked for suggestions from the floor on how to accomplish a management-employee dialogue.

Employee Smith suggested the committee system previously described. The source of the idea, he later testified, was a proposal put forth by OAE during their unsuccessful negotiations with Hertzka & Knowles prior to decertification.[13] The idea of adding a management representative to the committees was Smith's; he felt it would lessen what he termed the "long, tedious process" of negotiating with management that had been experienced with OAE as the bargaining agent. Smith's motion to adopt this system was seconded by two other employees and was approved by the employees, in the examiner's words, "overwhelmingly." An employee then suggested that the partners vote on the pro-

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[13] A similar idea was discussed at a pre-election meeting. Several Hertzka & Knowles employees invited representatives from another architectural firm to speak on a committee system in effect there.

posal. The suggestion was enthustically embraced, and the proposal passed unanimously.

The committees, though at the time of the Board hearing still in a nascent state, operate in a not unusual fashion. Their purpose is to discuss and formulate proposals for changes in employment terms and conditions; in some cases, it was contemplated that proposals would have to be passed on to management. Meetings are sometimes held on company time without loss of pay. On some committees the management member votes but apparently not on others. The firm representative, like other committee members, is consulted on meeting times and participates fully in the proceedings.

The issue for our consideration is whether the employer's participation in the system's approval and operation represents an illicit degree of interference, under § 8(a)(2), with its formation and administration.

Central to the National Labor Relations Act is the facilitation of employee free choice and employee self-organization. Indeed, § 8(a)(2) is, in part, a means to that end, for it seeks to permit employees to freely assert their demands for improvements in working conditions. Literally, however, almost any form of employer cooperation, however innocuous, could be deemed "support" or "interference." Yet such a myopic view of § 8(a)(2) would undermine its very purpose and the purpose of the Act as a whole—fostering free choice—because it might prevent the establishment of a system the employees

desired. Thus the literal prohibition of § 8(a)(2) must be tempered by recognition of the objectives of the NLRA.

In saying this, we are merely repeating what Senator Wagner said of § 8(a)(2) when he introduced his bill to the Senate:

> The erroneous impression that the bill expresses a bias for some particular form of union organization probably arises because it outlaws the company-dominated union. Let me emphasize that nothing in the measure discourages employees from uniting on an independent—or company-union basis, if by these terms we mean simply an organization confined to the limits of one plant or one employer. Nothing in the bill prevents employers from maintaining free and direct relations with their workers. . . . The only prohibition is against the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules and regulations without his consent, and which cannot live except by the grace of the employer's whims.

Statutory History of the United States: Labor Organization 278-79 (R. Koretz, ed. 1970) (remarks of Feb. 21, 1935).

For this same reason courts have emphasized that there is a line between cooperation, which the Act encourages, and actual interference or domination considered from the standpoint of the employees, which the Act condemns. *See, e.g., Federal-Mogul Corp.* v. *NLRB*, 394 F.2d 915, 918 (6th Cir. 1968);

NLRB v. *Prince Macaroni Manufacturing Co.*, 329 F.2d 803, 809-12 (1st Cir. 1964); *Chicago Rawhide Manufacturing Co.* v. *NLRB*, 221 F.2d 165, 167-68 (7th Cir. 1955). In *NLRB* v. *Wemyss*, 212 F.2d 465 (9th Cir. 1954), we declined to approve a Board finding that an employer interfered with and dominated the administration of an in-house committee system. Judging the § 8(a)(2) issue from the subjective standpoint of the employees, we said:

> [T]he question is whether the organization exists as the result of a choice freely made by the employees, in their own interests, and without regard to the desires of their employer, or whether the employees formed and supported the organization, rather than some other, because they knew their employer desired it and feared the consequences if they did not.

Id. at 471. We indicated that the employer must be shown to have interfered with the "freedom of choice" of the employees. *Id.* at 472.[14] The sum of this is that a § 8(a)(2) finding must rest on a showing that the employees' free choice, either in type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue. *Cf.* *NLRB* v. *Keller Ladders Southern, Inc.*, 405 F.2d 663, 667 (5th Cir. 1968); Note, *New Standards for*

[14] *See Modern Plastics Corp.* v. *NLRB*, 379 F.2d 201, 203-04 (6th Cir. 1967). *NLRB* v. *Post Pub. Co.*, 311 F.2d 565, 569 (7th Cir. 1962); *Chicago Rawhide Mfg. Co.* v. *NLRB*, 221 F. 2d at 167-68; *cf. Wayside Press, Inc.* v. *NLRB*, 206 F.2d 862, 865-66 (9th Cir. 1953).

Domination and Support Under Section 8(a)(2), 82 Yale L.J. 510, 519-32 (1973).[15]

Judged by this standard, we do not think there is substantial evidence, in the totality of circumstances, that Hertzka & Knowles violated § 8(a)(2). Unlawful support is not shown by the fact the committees meet at the firm and on firm time. *E.g.*, *Coppus Engineering Corp.* v. *NLRB*, 240 F.2d 564, 573 (1st Cir. 1957). Nor is it a weighty circumstance that Hanna called and opened the meeting at which the committee system was adopted. The idea was still that of an employee, and it was approved by the employees. There was no evidence produced at the hearing, that the employees' preference was affected by this fact. Finally, that the partners voted on the proposal is relatively meaningless; it was the result of a suggestion made by an employee and its enthusiastic acceptance by the body of employees.

The question essentially comes down to the significance of having management partners on the committees. True, this may mean bargaining is "weaker" than if there were a formally organized union. Yet this feature too was chosen by the employees, and it is one with which, for all the record shows, they are not dissatisfied. This is perhaps not unreasonable given the close contact that must exist between partners and professional associates in an architectural firm. There is no evidence, furthermore, of

[15] Alternatively, an employer's intended attempt to suppress employee rights of self-organization might well be condemnable under § 8(a)(2).

actual interference with the assertion of employee demands through the committees. At most, there is the management vote on some committees, and even where the partner votes, the employees can easily outvote him.

For us to condemn this organization would mark approval of a purely adversarial model of labor relations. Where a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act.

The Board will prepare a revised proposed order complying with this opinion.

Enforced in part and not enforced in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2971

[Filed Apr. 2, 1975, Clerk, U.S. Court of Appeals]

HERTZKA & KNOWLES, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ORDER

Before: KOELSCH and CHOY, Circuit Judges, and RENFREW,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. F.R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-2971

[Received Oct. 2, 1974, Clerk, U.S. Court of Appeals]

HERTZKA AND KNOWLES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

JUDGMENT

Before: KOELSCH and CHOY, Circuit Judges, and RENFREW,* District Judge.

THIS CAUSE came on to be heard upon the petition filed by Hertzka and Knowles to review an order of the National Labor Relations Board issued against the petitioner, its officers, agents, successors and assigns and a cross-application to enforce said order on September 28, 1973. The Court heard argument of respective counsel on June 11, 1974, and has considered the briefs and transcript of the record filed in this cause. On September 18, 1974, the Court being fully advised in the premises, handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

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* The Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

ORDERED AND ADJUDGED by the Court that Petitioner, Hertzka and Knowles, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Directly or indirectly threatening employees with layoffs or blacklisting or threatening to close down if they support or select the Union herein as their collective-bargaining representative.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act. (hereinafter called the Act.)

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post at its offices in San Francisco, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 20, N.L.R.B. (San Francisco, California), shall, after being signed by an authorized representative be posted as herein provided immediately upon receipt thereof, and be so maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the date of receipt of

this Judgment, what steps it has taken to comply herewith. With costs in favor of the N.L.R.B.

Endorsed, Judgment Filed and Entered

COSTS: N.L.R.B.—$180.60

So Ordered:

/s/ M. Alvin Koelsch

/s/ Hubert F. C. Choy
Circuit Judges

/s/ Charles B. Renfrew
District Judge—
(sitting by designation)

/s/ Emil E. Melfi
Emil E. Melfi
Clerk

A True Copy—Apr. 9, 1975

Attest:

By: /s/ Susan White
Deputy Clerk

[Filed Apr. 9, 1975]

[SEAL] [SEAL]

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER AS MODIFIED OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial at which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice and to keep our word about what we say in this notice.

The Act gives all employees these rights:

To engage in self-organization;
To form, join or help unions;
To bargain collectively through a representative of their own choosing;
To act together for collective bargaining or other mutual aid or protection; and
To refrain from any or all these things.

WE WILL NOT do anything that interferes with these rights.

More specifically,

WE WILL NOT directly or indirectly threaten employees with layoffs or blacklisting or threaten to close down, for the purpose of discouraging their

membership and support of the Organization of Architectural Employees, Local 2001, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

HERTZKA AND KNOWLES
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102. Telephone Number: (415) 556-0335.

APPENDIX D

San Francisco, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 20-CA-7968

HERTZKA AND KNOWLES

and

ORGANIZATION OF ARCHITECTURAL EMPLOYEES, LOCAL 2001, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

Case 20-RD-824

HERTZKA AND KNOWLES, EMPLOYER

and

RICHARD E. NYROS, an Individual, PETITIONER

and

ORGANIZATION OF ARCHITECTURAL EMPLOYEES, LOCAL 2001, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, UNION

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On May 30, 1973, Administrative Law Judge Herman Corenman issued the attached Decision in this proceeding, and on May 31, 1973, he issued an

addendum correcting the transcript. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Addendum in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge [1] and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Hertzka and Knowles, San Francisco, California, its officers, agents, successors, and assigns, shall take the actions set forth in said recommended Order.

IT IS FURTHER ORDERED that the election conducted on December 6, 1972, in Case 20—RD—824

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

be set aside and that this proceeding be, and it hereby is, remanded to the Regional Director for Region 20 for the purpose of conducting a new election at such time as he deems that circumstances permit the free choice of a bargaining representative.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 20 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations, Series 8, as amended. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and

employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[2] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Organization of Architectural Employees, Local 2001, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

Dated, Washington, D. C.

John H. Fanning,	Member
Ralph E. Kennedy,	Member
John A. Penello,	Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

[2] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 20 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

JD-(SF)-107-73
San Francisco, Calif.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 20-CA-7968

HERTZKA AND KNOWLES

and

ORGANIZATION OF ARCHITECTURAL EMPLOYEES, LOCAL 2001, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

Case No. 20-RD-824

HERTZKA AND KNOWLES, EMPLOYER

and

RICHARD E. NYROS, An Individual, PETITIONER

and

ORGANIZATION OF ARCHITECTURAL EMPLOYEES, LOCAL 2001, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

Michael K. Schmier, Esq., for the General Counsel.

Donald D. Connors, Esq., of *Brobeck, Phleger & Harrison*, San Francisco, Calif., for the Respondent.

Stewart Weinberg, Esq., of *Levy & Van Bourg*, San Francisco, Calif., for the Charging Party.

DECISION

Statement of the Case

HERMAN CORENMAN, Administrative Law Judge: A hearing in the above-entitled proceeding was held before the undersigned Administrative Law Judge on March 22, 23 and 26, 1973, at San Francisco, California, on a complaint of the General Counsel against Hertzka and Knowles, herein called the Respondent. The complaint, issued January 16, 1973, pursuant to charges filed by the Union January 10, 1973, alleges violations of Sections 8(a)(1) and (2) of the Act.

Under date of January 23, 1973, the Regional Director for Region 20 of the Board consolidated for hearing with the unfair labor practice case the issues presented by the Union's objections 1, 3, 4 and 5 to conduct affecting the results of the election held on December 6, 1972, in Case No. 20-RD-824.

All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses and to argue orally on the record. Briefs, which have been carefully considered, were filed by the General Counsel and the Respondent. Upon the entire record, and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

Hertzka and Knowles, herein called the Respondent, is a California corporation engaged in the business of providing architectural services with its principal place of business at San Francisco, California. During the past year Respondent received in excess of $500,000 for the performance of services to various clients, and in the course and conduct of its business operations, performed services valued in excess of $50,000 for the Pacific Gas and Electric Company, a public utility providing electricity and gas to the public in the State of California. During the past year Pacific Gas and Electric Company, in the course and conduct of its business operations, received gross revenues in excess of $250,000 and purchased and received supplies valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

Organization of Architectural Employees, Local 2001, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background*

The Union won a Board election and was certified by the Board on September 15, 1971, as the exclusive collective-bargaining representative for a unit of Respondent's professional architectural employees. Negotiations did not result in an agreement. The employees voted to strike on November 2, 1972, but withheld strike action after the decertification petition was filed. On November 3, 1972, architectural employee Richard Nyros filed a decertification petition with the 20th Region of the Board in Case No. 20-RD-824. A secret ballot election was conducted by the Board on December 6, 1972, which the Union lost by a vote of 11 for union representation and 14 against. The Union filed timely Objections to Conduct Affecting the Results of Election on December 8, 1972. After due investigation of the Union's objections, the Regional Director for the 20th Region overruled objections No. 2 and 6, and ordered a hearing on objections 1, 3, 4 and 5.

Nyros and other architectural employees arranged a series of meetings during the noon luncheon hour on the Respondent's premises so that the architectural employees could cast a ninformed vote at the impending December 6 election. All of these meetings were attended by one or more managerial representatives in addition to the rank and file employees. The first meeting was held on November 13, 1972. Peter Ekstein, the Union executive secretary, but not an

employee of the Respondent, was invited by Nyros to explain the Union's point of view to the employees at the November 13 meeting, and the entire hour was spent by Ekstein in presenting the Union's side for employee representation. A second meeting of the employees was held on November 15, 1972. Three architects in the employ of Skidmore, Owings and Merrill, herein called SOM, an architectural firm, were invited by Nyros and two other Hertzka and Knowles architectural employees to speak to the employees at this November 15 meeting and explain to them a committee plan of organization at SOM which had been utilized as an alternative to union representation. Nyros introduced these three employees who explained the so-called Policy Council or committee system instituted at SOM after the Union had lost an election at SOM. Respondent's management representative Robert Tobin who attended the November 15 meeting along with management representative George Hanna, admits he asked some questions of the SOM employees during the course of their talk explaining the Policy Council. Tobin recalled that he asked how the Policy Council was instituted and how the representatives were elected. Tobin also asked of the SOM people if the achievements of the Policy Council at SOM could not also be applied to Hertzka and Knowles. According to the credible testimony of Union representative Peter Ekstein, corroborated in substance by other witnesses who attended the November 15 meeting, Tobin asked the question during the November 15 meeting, "Don't

you think the Policy Council can achieve at Hertzka and Knowles what the Union can avhieve?" A third meeting was held on November 29 which was attended by the Hertzka and Knowles architectural employees as well as by managerial representative Bob Tobin, George Hanna and Ted Stolte, as well as Union representative Peter Ekstein. Respondent's management representative George Hanna spent the entire hour in reviewing the Union's contract proposals, one by one, and explaining the Respondent's position in the matter. Hanna also chose this November 29 meeting to argue against union representation, remarking, among other things, that the Carpenters Union did not understand the problems of architects, that once a contract was signed, no changes could be made, and that the Respondent could be required to open its books at the Union's demand if the employer claimed inability to pay.

B. *The December 1, 1972 Meeting*

The next meeting was held on December 1, 1972. It was attended by the architectural employees and by all members of management; namely, the two senior partners, Wayne Hertzka and William Knowles, and by Vice-Presidents Tobin, Hanna and Stolte. At this December 1 meeting George Hanna continued reviewing the Union's contract proposal as he had done at the November 29 meeting. It is with respect to the December 1 meeting that the General Counsel's complaint alleges that Respondent's supervisors made remarks violative of Section 8(a)

(1) of the Act as follows: namely, (1) Knowles threatened employees that Respondent would close its plant in the event the employees designated the Union to continue as their collective-bargaining representative in the forthcoming Board election; (2) Hertzka and/or Tobin threatened employees that if they did not decertify the Union in a forthcoming Board election, Respondent would reduce the number of its employees; (3) Tobin and/or Hanna, and/or Hertzka promised its employees that Respondent would create committees for the purpose of bargaining collectively with Respondent regarding wages, hours and other terms and conditions of employment in order to induce the employees to vote against the Union in the forthcoming Board election.

At the December 1 meeting, I find, based on the credible testimony of Klein and Peter Ekstein, corroborated by others who attended the December 1 meeting, that managerial representative Tobin stated to the employees that a Policy Council similar to that at SOM could be affected as a conceivable alternate to the Union at Hertzka and Knowles "and we could deal with the problems wholly in the office without any outside assistance." Tobin also reminded the employees assembled at the meeting of the sporadic nature of an architect's employment and the necessity to move from one job to another, and in this connection Tobin told the employees that they might encounter difficulty in finding work with other architectural firms if it were known they had come from a unionized office. At this juncture in Tobin's

talk, union representative Peter Ekstein, who is not an employee of Hertzka and Knowles, made the remark that this was a threat to "black list" or "blackball." Tobin did not reply. Tobin also told the assembled people, according to the credible testimony of employee Klein, corroborated in substance by others who attended the December 1 meeting, that "inasmuch as all of the Hertzka and Knowles clients are corporate clients, that in the event the Union was successful, this was an area of work which might very well dry up or words to that effect." According to Klein's credible testimony, Tobin also told the assembled group that in the event corporate work ceased, this would have an adverse effect on the company; work of a lesser significance would have to be sought and this would result in a probable reduction in staff because of the lesser amount of work. Employee Smith credibly testified that senior partner Wayne Hertzka, who also attended the December 1 meeting, told the group following Tobin's remarks that "the only clients he knew how to get were commercial clients, and that if the Union were voted in or if this was a union office, this would reflect to the clients, and the clients would probably not be in favor of giving work to our office because we were union; most businessmen are avidly against unions." According to Smith's credible testimony Hertzka went on to say at the December 1 meeting "that the work would probably be reduced . . . and we would all suffer from it . . . we would have to reduce the staff."

Senior partner William Knowles also attended the December 1 meeting and responded to a question about the Respondent's altruism. According to the credible evidence of employee-architect John Klein who is corroborated in substance by other people who were present at the December 1 meeting, Knowles explained to the assembled group an arrangement between himself and Mr. Hertzka to gradually turn over ownership to the senior members of the corporation.[1] Knowles told the group that from an economic point of view neither he nor Mr. Hertzka had to work for a living and he wanted to transfer the ownership to keep the firm in operation. Knowles said he felt a responsibility to the profession and to the people at Hertzka and Knowles. Klein credibly testified further that Knowles spoke further about the mechanics of turning over the firm, and said that as far as he and Hertzka were concerned, they did not have to continue working—"he could close the doors at any time." According to Klein's credible testimony when Knowles made the remark that "he could close the doors at any time", this aroused union representative Peter Ekstein who engaged in a

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[1] Mr. Knowles was referring to an agreement made February 3, 1969, wherein Mr. Hertzka and Mr. Knowles, who owned all the stock of the corporation, had agreed to sell the corporate stock to the five vice-presidents; namely, Tobin, Dolim, Dean, Hanna and McDonald for a purchase price of not less than $250,000.

brief exchange of words with Knowles which Klein was unable to catch. According to Klein's credible testimony, corroborated by others who testified, Knowles appeared quite angry and took a step toward Ekstein, and Hertzka laid his hand on Knowles' arm to restrain him.

Architect employee Dennis Smith, who was also present at the December 1 meeting, testified that in describing the management agreement to transfer the firm to the vice-presidents, Knowles stated that Hertzka and himself did not have to continue the firm, "they could have closed the doors down at any time, but they felt obligated to pass the firm on to the employees." According to Smith's credible testimony, it was at this point that Ekstein responded to Knowles' statement as follows: "What you are doing is threatening to fire everybody in this firm and that is an unfair labor practice." [2] Smith testified credibly that during this brief exchange with Ekstein, Knowles in a loud, angry voice "commented about the fact the people in the office wanted a union for the sake of having a union that when we affiliated with the carpenters, we were playing with a loaded stick of dynamite—that was liable to blow us all up." Smith testified credibly further that after

[2] This is based on Ekstein's testimony who made the remark. On cross-examination, Ekstein conceded that Knowles did not say he was going to abandon the plant and close the shop, but that Knowles said he could, not that he was going to.

a remark from Peter Ekstein which angered Knowles just a little bit more, Bill Knowles turned around and tapped Wayne Hertzka on the shoulder and said, "Come on, Wayne, we don't have to put up with this. We can close down. We don't have to worry about this stuff." [3] It appears from the testimony of several witnesses that immediately following Ekstein's remarks, there was a considerable undercurrent of talk by several people. Ekstein, himself, concedes he did not hear what Knowles said to Hertzka, but it was observed that Knowles was engaged in conversation with Hertzka.

On the basis of all the testimony bearing on Knowles' remarks to Hertzka after the exchange of words between Knowles and Ekstein, I have observed that no one contradicts Smith's testimony as to what was said by Knowles to Hertzka, but other witnesses either do not remember or did not hear the words because of the noise from other voices. I am persuaded that the remarks testified to by Smith were made by Knowles to Hertzka in a pique of anger after his exchange with Ekstein. Hertzka testified he did not remember Knowles saying any-

[3] Knowles testified that in reciting the stock transfer to the employees, he reached the point where he said, "the alternative to this was to close up or words to that effect, and at this point, as I recall, Mr. Ekstein jumped off the stool he was sitting in front of me and said, "That's a threat—an unfair labor practice." Knowles testified that following Ekstein's remark, he doesn't recall what he said or if he said anything.

thing. Knowles conceded, however, that he might have said to Hertzka, "Let's go—we don't have to take this."

Similar to the remarks made by Tobin to the people at the December 1 meeting, management representative Stolte also told them, according to De Paoli's credible and corroborated testimony, that he had been asked by potential clients whether or not the office was union, and he said he had been answering no, and he felt relieved he could say no. Stolte also told the assembled group that in the pursuit of work, quite often firms are rejected or not accepted for specific jobs "and that you really never know why you are turned down for a job." Hertzka made the closing remarks at the December 1 assembly according to De Paoli's credible testimony, saying "Trust us and vote out the Union, vote no union."

C. *Analysis and Conclusionary Findings Concerning the Respondent's Remarks at the December 1 Assembly of Employees*

It is clear that the December 1 meeting was called for the purpose of urging the employees to vote against the Union in the approaching December 6 election. In agreement with the General Counsel, I find that the remarks made by management representative Tobin recommending the establishment of a committee system to replace the Union violated Section 8(a)(1) of the Act. *NLRB* v. *U.S. Railway*

Equipment Co., 424 F.2d 86; 73 LRRM 2393, 2398-2399—*Fremont Newspapers, Inc.*, 436 F.2d 665 (C.A. 8, 1970), 76 LRRM 2049, 2050.

I find myself in agreement with the General Counsel's contention that the Respondent's December 1 remarks to the assembled employees that unionization will result in loss of business from corporate and commercial firms and will result in employee layoffs, was not privileged by Section 8(c), but constituted an implied threat of employment loss, in violation of Section 8(a)(1) of the Act. The Respondent produced no evidence to show that his clients would withdraw or had withdrawn their business because of the Respondent's unionization. The record shows that the unionization of the Respondent was a matter of general knowledge and was publicized in trade journals and union newspapers. The Respondent produced evidence from management representative Stolte that on one occasion a state employee and another occasion a friend of his had inquired whether the Respondent was unionized, but there is a total absence of any evidence that these people refused to give any business to the Respondent because its architects were represented by a union. Additionally, the record shows that during the certification year from September 1971 to September 1972, the Respondent substantially increased its employee complement of architects. It is reasonable to infer, therefore, that the Respondent's ar-

chitectural work substantially increased during the period of its unionization.

In *Blaser Tool and Mold Co.*, 196 NLRB No. 45 (1972), 80 LRRM 1014, the Board in reversing the Administrative Law Judge, held that an employer's pre-election speech to his employees in which he stated that his major customer was free to withdraw its patronage at any time and he was apprehensive that this customer would cease doing business with the employer if the employees voted for the Union, constituted a threat to close down. In support of its conclusion, the Board said as follows at 80 LRRM, pages 1015-1016:

> "It is well established [case citation omitted] that employer predictions of adverse consequences arising from sources outside his control are required to have an objective factual basis in order to be permissible under Section 8(a)(1). The Respondent offered no factual basis for Blaser's suggesting the possibility that Winter Co. would withdraw its patronage if the employees voted for the Union. In these circumstances, and in view of the antiunion context of Blaser's remarks, we conclude that the statements were implied threats of job loss and plant closure made for the purpose of inducing the employees to vote against the Union in the forthcoming Board election. As such, they constituted a violation of Section 8(a)(1) of the Act and interfered with the election." [case citations omitted]

The issue as to whether an employer's stated apprehension that unionism would result in customer withdrawal of business resulting in layoffs, constitutes a threat not privileged by Section 8(c) of the Act was considered by the United States Supreme Court in *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575, and the related *Sinclair* case, 395 U.S. 575, 71 LRRM 2481. In this connection, the Supreme Court stated as follows at 72 LRRM, pages 2497-2498:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects as he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20, 58 LRRM 2657 (1956). If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on avail-

able facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that "conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." 397 F.2d at 160, 68 LRRM 2720. As stated elsewhere, an employer is free only to tell "what he reasonably believes will be likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *NLRB* v. *River Togs, Inc.*, 382 F.2d 198, 202, 65 LRRB 2987 (C.A. 2, 1967). . . .

. . . that the Board has often found that employees, who are particularly sensitive to rumors of plant closings, [case citations omitted] take hints as coercive threats rather than honest forecasts.

Petitioner argues that the line between so-called permitted predictions and proscribed threats is too vague to stand up under traditional First Amendment analysis and that the Board's discretion to curtail free speech rights is correspondingly too uncontrolled. It is true that a reviewing court must recognize the Board's competence in the first instance to judge the impact of utterances made in the context of the employer-employee relationship [case citations

omitted]. But an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in " 'brinkmanship' " when its becomes all too easy to "overstep and tumble into the brink," [case citations omitted]. At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

Adopting the same rationale which led to my conclusion that the Respondent's expressed apprehension that unionization would result in loss of customers and would result in employee layoffs, constituted a threat not privileged by Section 8(c) of the Act, I also am of the opinion, and I find, that the Respondent's remarks that the employees, when laid off, would find themselves unwelcome at other architectural firms, constituted an implied threat of blacklisting, not within the Section 8(c) free speech privilege. Here again, there was no evidence that other architectural firms were blacklisting. Remarks suggesting blacklisting by an employer hostile to unionism carried the implication that blacklisting would be inaugurated. The record shows without dispute that layoffs are frequent in the architectural industry and architects are often loaned from one firm to another. Additionally, the firms cooperate with one another in finding jobs for laid off architects. It is

clear, therefore, that architects who are prone to be laid off, would be especially sensitive to suggestions that they might be "black-listed." Here again, as frowned upon by the Supreme Court in the *Sinclair* case, the Respondent was engaging in "brinkmanship" when it became all too easy to "overstep and stumble into the brink." The Respondent was raising the specter of "black-listing" to a group of employees sensitive to periodic layoffs and loans between employers. See also *Texas Transport Co.*, 187 NLRB No. 78 (1970), 76 LRRM 1057, 1060; *Coca Cola Bottling Co. of San Mateo*, 188 NLRB No. 91 (1971), 76 LRRM 1379, where the Board held that employer remarks to employees that they would have difficulty in finding jobs elsewhere if they joined the Union, violated Section 8(a)(1) of the Act.

It needs no argument to support my further finding that Knowles' angry remark at the December 1 meeting as follows: "Come on Wayne, we don't have to put up this this; we can close down", constituted a threat in violation of Section 8(a)(1) of the Act.

D. *The Committee System*

The Respondent's employees were first introduced to the committee system as an alternative to representation by the Union on November 15, 1972, when three architectural employees from another firm appeared at a noon lunchtime assembly of Respondent's employees and described the functions of the Policy

Council which was functioning at SOM as an alternative to the OAE which had lost a representation election at that firm. Respondent's management representative Tobin who was present at this assembly asked how the Policy Council was instituted and how the representatives were selected. He also asked the SOM people if the achievements of the Policy Council at SOM could not also be applied to Hertzka and Knowles, and if the SOM people didn't think the Policy Council could achieve at Hertzka and Knowles what the Union could achieve.

With the completion of the Board-supervised representative election on December 6, 1972, which the Union lost, Vice-President George Hanna announced to a group of employees that he was calling a meeting the next day where management was "going to put its money where its mouth was." On the following day all the employees assembled for the meeting at 10 a.m. in the drafting room. The meeting was also attended by management representatives Hertzka, Knowles, Tobin, Hanna and Stolte. Hanna chaired the meeting and began telling the assembled group that although the Union was decertified, there was also a significant vote for the Union, 11 individuals having voted for the Union. Hanna went on to state that he wished to keep rapport between management and the employees and asked for suggestions from the floor as to how this could be accomplished. One suggestion from the floor was to set up some form

of committee structure which could act as a spokesman for the employees to maintain a dialogue. Architect employee Dennis Smith, using a previous union contract proposal for assistance, then suggested the formation of five committees as follows: (1) Professional Stature with the Firm; (2) Remuneration for Professional Service; (3) Minimum Standards of Professional Employment; (4) Efficiency Committee; and (5) Environmental Committee.

The functions of the committees were discussed from the floor and questions asked in that regard. Explaining the functions of committees numbered 1, 2 and 3, above, Smith read them the functions outlined in the Union's contract proposal, I, II, III. (See General Counsel's Exhibit No. 6).[4] With re-

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[4] I. Professional stature within the firm

A. Standards of professional performance

1. Identification of professional performance
2. Identification of capability and repsonsibility
3. Capability and responsibility in relation to objective criteria for category assignment

B. Standards for objective measurement of professional stature

1. Periodic review
2. An evaluation system
3. Individual assignment

II. Remuneration for professional service

A. Rates

[Footnote continued on page 45a]

spect to committees numbered 4 and 5, above, Smith explained to the group that the Efficiency Committee would see if they could make the office run better. At this point Smith suggested that five employees serve on each committee so that each of the 25 employees employed by the Respondent could serve on a committee. Smith suggested that a member of management be on each committee which Smith said would be beneficial to the action of each committee. Employee John Klein moved to adopt Smith's proposed committee system. Vice-President Hanna called for a vote on Smith's proposal by show of hands and the vote was overwhelmingly in favor of adopting the committee structure. After the employees had voted on the motion, it was pointed out by some individual that none of the management people had voted and someone made a statement at that time, "You are as much a part of this as anybody else. Why don't you vote." And at that point all the management representatives voted to adopt the committee structure, and the final vote, including that of management, was unanimous. After the vote was

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[4] [Continued]

B. Cost of living adjustment
C. Incentives

III. Minimum standards of professional employment

A. Conditions of employment
B. Continuation and termination
C. Resolution of grievances

taken, Vice-President George Hanna said, "Well now, let's do it." That afternoon people were placed, as far as possible, on the committee of their choice. After the employeecomplement of each committee was determined, Smith, with the help of two other employees designated a management representative for each committee. Having completed the full committee complement, Smith took the list of names for each committee to Vice-President George Hanna and asked if it met with his approval. Hanna glanced at the list and said, "That's fine." Each management representative was approached by Smith to determine if they were satisfied to serve on the designated committee and each agreed to serve. All of the activity in connection with forming the committee was performed on company time. It was the understanding that the resolution of each committee would be communicated to top management by the management member of the committee. It was stated by Smith at the December 7 meeting that the management individual would take an active part within the committee structure, would have the same rights as other members of the committee, but could not be committee chairman. It was understood that if something was resolved in the committee, then the management member of that committee would be obligated to take this to the remainder of the management individuals and get their approval. According to the credible testimony of Dennis Smith who presented the plan at

the December 7 meeting, the management member of each committee could vote. Smith himself is on the Environmental Committee which at the time of the hearing had had three meetings, all attended by Vice-President Stolte who also votes on committee action. At the time of the hearing the Environmental Committee had not presented any demands to management. Committee meetings are held on lunch time or on company time without employees being docked, and the meetings are usually held in the Respondent's conference room. The Physical Environment Committee reviews the physical office or plant, how it can be improved and considers how the environment can be changed to improve the function of the individual employees. The Minimum Standards Committee considers conditions of employment, wages, hours, benefits, vacation and sick leave, jury duty and subjects of that nature.

Each committee has had several meetings prior to the hearing in this matter. The employees pay no dues and there is no visible means of support other than that furnished by the Respondent. Management members are contacted before scheduling committee meetings. The management member participates in the discussion of the business before the meeting, is physically present and is in a position to observe the positions taken by the employee members of the committee and to observe the vote of each employee committee member.

E. *Analysis and Conclusionary Findings with Respect to the Validity of the Committee System at Hertzka and Knowles*

The Respondent first indicated its predilection for a committee system as an alternative to the Union in the November 15 meeting where Vice-President Tobin, in the presence of the assembled employees, asked the rhetorical question if the SOM people didn't think the Policy Council could achieve at Hertzka and Knowles what the Union could achieve. This was confirmed in stronger language by Vice-President Tobin at the December 1 meeting where he proposed to the assembled employees, as a means of defeating the Union in the approaching December 6 election, that "we could set up a Policy Council at Hertzka and Knowles similar to that at SOM, and that it would be a more suitable alternative to the Union, and we could deal with the problems wholly within the office without any outside assistance." [5] The committee system was adopted at the December 7 meeting which was called by management and which was attended by all employees and all the management people. This December 7 meeting was called and chaired by management representative Hanna. The vote was taken in full view of management and management people joined in the voting. It is clear

[5] The quote is from Ekstein's credible and corroborated testimony.

without question that the Respondent interfered with the information of the committee system by its action in suggesting its formation and in calling, presiding at, attending and in voting at a meeting on the committee's establishment and functions. Moreover, management interferes with and dominates the administration of the committee system by virtue of the fact that a management representative is a member of each committee, and attends and takes part in the business of the committee meetings, observes the action and words of the employee members of the committee, votes on action taken by the committees, and observes the votes of others on committee business. Thus, Respondent's management sits on both sides of the bargaining table and frustrates free collective bargaining. See *N.L.R.B.* v. *Stow Mfg. Co.*, (C.A. 2, 1954) 217 F.2d 900, 35 LRRM 2210, where in agreement with *American Enka Corp.* v. *N.L.R.B.*, 119 F.2d 60 (C.A. 4) the court, in enforcing the Board's disestablishment order, said: "Collective bargaining becomes a delusion and a snare if the employer either directly or indirectly is allowed to sit on both sides of bargaining table."

Under the committee system which prevails at the Respondent, the employees, whose every action at committee meetings is under the intimate observation and surveillance by management representatives, cannot function as an independent labor organization and the committee becomes little more than a tool of

management which perforce dominates and interferes with the administration of the committees.

Additionally, the Respondent supplies assistance and support to the committees by furnishing them with a meeting place and permitting the committees to meet on working time without loss of pay.

I am convinced and I find that the committee, all of which are dealing with the Respondent with respect to wages, hours and working conditions, are labor organizations within the meaning of Section 2(5) of the Act. I further find that the Respondent has been, and is dominating and interfering with the formation and administration of the committees and has been, and is contributing financial and other support to the committees, and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act. *N.L.R.B.* v. *Cabot Carbon Co.*, 360 U.S. 203 (1959), 44 LRRM 2204, and cases cited at footnote 14 on page 2207.

I am in disagreement with the Respondent's contention that it is merely cooperating with the five committees and has not dominated or interfered with the formation or administration of the five committees. The facts in the cases cited by the Respondent are distinguishable in that the organizations there were not formed in a context of antiunion hostility, the labor organizations were in fact independent and free from employer control and the assistance given

was minor and did not destroy the labor organization independence.

As I have detailed above in this Decision, it is established that the committee system was suggested by management as a means of defeating the Union in an approaching Board election and the committees were nurtured in a background of hostility to the certified union involving threats of blacklisting, employee layoffs and plant closure if the Union was retained.

The committees were formed in a meeting of employees on December 7, called for that express purpose by management and presided over by management, at which all the management executives attended and approved the formation of a committee system which could function only in the presence of, and with the attendance of a management representative who by his mere presence and participation destroys the independence of the committee.

Under all of the circumstances, I am persuaded, and I find, that the Respondent is violating Section 8(a)(2) and (1) of the Act, requiring the remedy of disestablishment. See e.g., *N.L.R.B.* v. *Weymss*, 212 F.2d 465, 471 (C.A. 9, 1954); *N.L.R.B.* v. *Ampex Corp.*, 442 F.2d 82 (C.A. 7, 1971); *N.L.R.B.* v. *Arrow Specialties, Inc.*, 437 F.2d 522 (C.A. 8, 1971); *N.L.R.B.* v. *Buitoni Foods Corp.*, 298 F.2d 169, 173 (C.A. 3, 1962); *N.L.R.B.* v. *Philamon Laboratories, Inc.*, 298 F.2d 176, 181 (C.A. 2, 1962); *N.L.R.B.*

v. *Clapper's Mfg. Inc.*, 458 F.2d 414 (C.A. 3, 1972); *N.L.R.B.* v. *Thompson Ramo Wooldridge, Inc.*, 305 F.2d 807, 810 (C.A. 7, 1962); *Utrad Corporation* v. *N.L.R.B.*, 454 F.2d 520 (C.A. 7, 1971); *Overland Distribution Centers, Inc.*, 194 NLRB No. 113, 79 LRRM 1188 (Dec. 23, 1971); *Goulds Pumps, Inc.*, 196 NLRB No. 118, 80 LRRM 1213 (May 1, 1972); *Distribution Centers*, 197 NLRB No. 1, 80 LRRM 1257 (May 22, 1972); *Solmica, Inc.*, 199 NLRB No. 41, 81 LRRM 1334 (Sept. 22, 1972); *Justus Co., Inc.*, 199 NLRB No. 51, 81 LRRM 1517 (1972); *Mikami Brothers*, 188 NLRB No. 78, 76 LRRM 1425 (Feb. 12, 1971); *Glover Packing Co.*, 191 NLRB No. 102, 77 LRRM 1695 (1971); *Turney Electrical Mfg. Co.*, 192 NLRB No. 41, 77 LRRM 1751 (July 26, 1971); *Lowen Company, Inc.*, 203 NLRB No. 86, slip opinion, pages 4 and 5.

F. *The Objections to Election*

As I have found that the Respondent engaged in serious unfair labor practices within the purview of the Union's timely Objection to the Election, in the interval between the filing of the decertification petition on November 3, 1972, in Case No. 20-RD-824 and the secret ballot election held on December 6, 1972, and as I further find that such conduct by the Respondent interfered with the employees' free and uncoerced choice in the selection or retention of the Union as the exclusive collective-bargaining repre-

sentative, I shall recommend that the Union's Objection to the Election be sustained and that the aforesaid election be set aside and that a new election be held at an appropriate time within the sound discretion of the Regional Director for Region 20 of the Board. See *Daltex Optical Company, Inc.*, 137 NLRB 1702, 1786-1787; *General Shoe Corp.*, 77 NLRB 124, 21 LRRM 1337.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent, Hertzka and Knowles, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Organization of Architectural Employees, Local 2001, United Brotherhood of Carpenters and Joiners

of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The five committees, known as (1) Professional Stature with the Firm; (2) Remuneration for Professional Services; (3) Minimum Standards; (4) Efficiency; and (5) Physical Environment with which the Respondent deals with respect to wages, hours and other terms and conditions of employment, constitute labor organizations within the meaning of Section 2(5) of the Act.

4. By dominating and interfering with the formation and the administration of the aforesaid committees and by contributing financial or other support to them, the Respondent has violated and is violating Section 8(a)(2) and (1) of the Act.

5. By its implied threats of closing down, of employee layoffs and employee blacklisting made to its employees, the Respondent has interfered with, restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act, and has thereby violated and is violating Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices have and are affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has unlawfully dominated and interfered with the formation and

administration of the committees referred to above in this Decision and has contributed financial and other support to the committees, I will recommend that the Respondent be required to withdraw and withhold all recognition from and completely disestablish the aforesaid committees or any successor thereto.

Having found that the Respondent engaged in other unfair labor practices in violation of Section 8(a)(1), I shall recommend that it cease and desist from such conduct and that it take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[6]

ORDER

Respondent, Hertzka and Knowles, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Dominating or interfering with the formation

[6] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

or administration of the committees referred to herein or any successor thereto, or any other labor organization, or contributing financial or other support thereto.

(b) Directly or indirectly threatening employees with layoffs or blacklisting or threatening to close down if they support or select the Union herein as their collective-bargaining representative.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Withdraw all recognition from the several committees referred to in this Decision and completely disestablish said committees or any successor thereto, as the collective-bargaining representative of its employees with respect to wages, hours, rates of pay, grievances and other terms and conditions of employment.

(b) Post at its offices in San Francisco, copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional

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[7] In the event that the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Director for Region 20, shall, after being signed by an authorized representative be posted as herein provided immediately upon receipt thereof, and be so maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the aforesaid Regional Director, in writing, within 20 days from the date of receipt of this Decision, what steps it has taken to comply herewith.

Dated:

/s/ Herman Corenman
Herman Corenman
Administrative Law Judge

APPENDIX

[SEAL] [SEAL]

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE
UNITED STATES GOVERNMENT

After a trial at which all sides had the opportunity to present their evidence, an Administrative Law Judge of the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice and to keep our word about what we say in this notice.

The Act gives all employees these rights:

To engage in self-organization;
To form, join or help unions;
To bargain collectively through a representative of their own choosing;
To act together for collective bargaining or other mutual aid or protection; and
To refrain from any or all these things.

WE WILL NOT do anything that interferes with these rights.

More specifically,

WE WILL NOT directly or indirectly threaten employees with layoffs or blacklisting or threaten to close down, for the purpose of discouraging their

membership and support of the Organization of Architectural Employees, Local 2001, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

WE WILL permanently withdraw and withhold recognition from, and completely disestablish the committees, or any successor thereto as bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

HERTZKA AND KNOWLES
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California 94102. Telephone Number: (415) 556-0335.

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Supreme Court, U. S.
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In the Supreme Court of the United States

No. 75-22

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HERTZKA & KNOWLES,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

No. 75-22

NATIONAL LABOR RELATIONS BOARD,
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vs.

HERTZKA & KNOWLES,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent Hertzka & Knowles submits this brief in opposition to the Petition for a Writ of Certiorari heretofore filed by the Solicitor General of the United States on behalf of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 503 F.2d 625. It is reproduced as Appendix A to the Petition. The Decision and Order of the Board is reported at 206 NLRB 191. It is reproduced as Appendix D to the Petition.

JURISDICTION

The Board's petition for rehearing was denied on April 2, 1975; the judgment of the Court of Appeals was entered on April 9, 1975.[1] Jurisdiction here is invoked by petitioner under the provisions of 28 U.S.C. 1254(1).

QUESTION PRESENTED

We differ with the Board as to the question presented. We think that two questions arise:

> Whether the Board properly concluded from the evidence adduced that the committees of the employer's employees were not freely constituted in consonance with the provisions of Section 7 of the Act, and
>
> Whether a Circuit Court can reject a finding by the Board that a violation of Section 8(a)(2) has occurred as not supported by substantial evidence on the record considered as whole, although the record so considered supports evidence of violation of Section 8(a)(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat 136, 73 Stat 519, 29 U.S.C. 151 *et seq.*), are:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

1. A copy of the petition for rehearing appears at 15a, App. B to the Petition; a copy of the judgment appears at pp. 16a-20a, App. C to the Petition.

> "Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> "(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> • • • • •
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> "Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpose, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:"
>
> • • • • •
>
> "Sec. 10. (f) . . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

STATEMENT

In September of 1971 the Board certified the Organization of Architectural Employees (OAE)[2] as the bargaining representatives of the architectural employees of Hertzka & Knowles (Hertzka). Fourteen months of bargaining ensued but no agreement was reached.

In November of 1972 a decertification petition was filed by an employee named Richard Nyros (P. 28a).[3] Nyros and other employees arranged for a series of meetings during noon lunch hours so that the employees could cast an informed vote at the impending election (P. 28a).

The first such meeting was devoted to an exposition of what the OAE could do for the employees; an hour was spent by Peter Ekstein, Executive Secretary of OAE, "in presenting the Union's side for employee representation" (P. 28a, 29a).

At the second meeting three employees of Skidmore, Owings & Merrill (SOM) another architectural firm talked with Hertzka and Knowles employees and explained a "committee plan of organization" which had been, at SOM, "utilized as an alternative to union representation" (P. 29a).

The third meeting was held on November 29. Company Vice President George Hanna reviewed the course of contract negotiations and explained the position of Hertzka and Knowles vis-a-vis union representation (P. 30a). The December 1 meeting was a continuation of the meeting of November 29. The Section 8(a)(1) violations found by the

2. Sometime later, probably in September of 1972, OAE affiliated or merged with United Brotherhood of Carpenters & Joiners of America, AFL-CIO.

3. References preceded by "P." are to the Petition; the numerals are of course page numbers.

Board and affirmed by the Circuit occurred at this meeting (P. 4a-8a).

On December 6, the Board conducted the decertification election. The vote was 14 to 11[4] against further representation by OAE.

On December 7 all of the employees and principals save Knowles (one of the two owners of the enterprise) (Tr. 315, 341)[5] met in the Company's drafting room (P. 43a, Tr. 106, 194). This meeting was requested by an employee (Tr. 276). Hanna conducted the meeting (Tr. 167),[6] and opened it by observing that while it was evident from the tally of ballots that the employees had chosen "not to go the union route", the "eleven votes in favor of the union would have to be taken into account" (Tr. 167). Hanna then proposed consideration of an alternative structure for dealing with "problems of the employees." "He wanted the proposals to come from the people there" (Tr. 168, 194).

Petitioner asserts that an employee Dennis Smith thereupon suggested the establishment of a committee system "similar to what they had at SOM" (P. 5). No citation to the record is given to explain petitioner's use of quotation marks.

Smith himself testified that the committee system he proposed was taken from an early proposal of OAE, i.e., a proposal made by the union to Hertzka & Knowles during the 14 months of negotiations (Tr. 195-196). Smith also

4. The Administrative Trial Judge found that on November 2, 1972 the employees "voted to strike" (P. 28a). What he did not explicate was that only 11 of the 25 employees voted to strike (Tr. 83). This scarcely qualifies as a thumping vote of confidence.

5. It is uncontradicted that Knowles was not present.

6. The meeting was so informal that one employee doubts that anyone was chairman (Tr. 276).

said that when he proposed the committees at the December meeting he had "no thought of this policy council from SOM" (Tr. 216, ls 1-8).

Petitioner asserts that "management representatives took an active part on the committee." (P. 6). Passing by that ambiguity, we point out that the system envisions that the management member of each committee (he cannot be its chairman) is obligated to forward any resolution his committee may make "to the remainder of management individuals and get their approval" (Tr. 208, ls 6-8).[7]

While it is true that committee meetings were held on Company premises at lunch time or on Company time without loss of pay, it is also true that the bargaining sessions during the 14 months of negotiations with OAE were held on Company premises and (sometimes) during working hours, and that Company employees on the negotiating committee did not suffer loss of pay (Tr. 237, 467-469).

THE BOARD'S DECISION AND ORDER

The Board found, *inter alia*, that the committee system constituted a labor organization (P. 48a-50a). It also found that this labor organization was dominated and assisted by the Company in its formation and administration, in violation of Section 8(a)(1) and (2) of the Act.

The Law Judge did not accept the Company's contention that its role was that of cooperation (P. 50a-51a).

7. Smith, the progenitor of the committees, testified:
"Basically what I pictured this to be was . . . that the management individual would take an active part in the committee structure, and would have just as many rights or privileges on that committee as any other member of the committee, but would not be allowed to be the chairman of the committee because I did not want the management individual to dominate the committee . . ." (Tr. 207, ls 22-25; Tr. 208, ls 1-3).

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals rejected the inaccurate, unfounded and conclusionary language of the Law Judge[8] that the committees were formed by and are dominated by management.

It found that which is plainly to be found from the evidence, i.e., that the committee system was suggested by an employee, that its source was an OAE proposal[9] made during the unsuccessful negotiations and that this suggestion was overwhelmingly approved by the employees. It also found that an employee suggested that partners vote on that proposal and that this suggestion was "enthusiastically embraced" and unanimously passed (P. 9a-10a).

It also found that management members vote on some committees and not on others, as the evidence shows, and that the management member, as are other members, consulted as to times of meetings (P. 10a, 13a).

The Circuit also found that Section 8(a)(2) is, in part, a means to the central theme of the Act, i.e., employee free choice and employee self-organization, for Section 8(a)(2) seeks to permit employees freely to assert their demands for improvements in working conditions.

In short, the Circuit found that there was no substantial evidence that Hertzka & Knowles violated Section 8(a)(2).

8. "The committees were formed in a meeting of employees on December 7, called for that express purpose by management and presided over by management, at which all the management executives attended and approved the formation of a committee system which could function only in the presence of, and with the attendance of a management representative who by his mere presence and participation destroys the independence of the committee" (P. 51a).

9. i.e., that it was *not* modeled after the SOM system.

ARGUMENT: REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the Circuit in this case presents no novel question under 8(a)(2) nor under any other section of the Act, nor does the decision "impose any limitation" upon Section 8(a)(2), or upon the Act otherwise. On the contrary, the decision below explicitly recognizes that the rights of employees freely to organize and to be represented as they wish to be represented[10] are protected by Section 7, and are not to be taken from employees where the domination or interference condemned by Section 8(a)(2) is not real domination or interference, or where a finding of the presence of either is not supported by substantial evidence on the record considered as a whole.

National Labor Relations Board v. Link-Belt Co., 311 U.S. 584, does not stand for the broad interdiction which the Board ascribes to it. That decision recognizes, as did the Ninth Circuit in the case at bar, that an "inside union" as well as an "outside union" may be the product of the right of the employees to self-organization and to collective bargaining through representatives of their own choosing, as guaranteed by Section 7 of the Act. 311 U.S. at 587.

The sole question posed in *Link-Belt* was:

> ". . . whether the Board was justified in concluding that [the] Independent [union] was not the result of the employees' free choice because the employer had intruded to impair their freedom." (311 U.S. at 587).

10. The Board complains (P. 13, fn 9) that it would be "premature to assume employee satisfaction" with the committee system. There is no need to "assume" it. The uncontradicted testimony was that the committees fairly represented the employees, Tr. 281. Th Law Judge permitted no other testimony along those lines, with the observation: "I really think the issue here is not whether the committees represent the employees . . ." (Tr. 282).

In finding that the "whole congeries of facts before the Board" (311 U.S. 588) supported its finding that Independent was dominated, the Court noted the following factors:

1. the employer's "long standing industrial espionage" (311 U.S. at 588);
2. evidence of the employer's "hostility" towards an "outside union" (311 U.S. at 588);
3. the discharge of five employees for union activity (311 U.S. at 589-590, 601-603);
4. the insistence by foremen or leadmen that employees join the Independent (311 U.S. at 591-596); and
5. the conditioning of employment upon membership in the Independent (311 U.S. at 601).

In marked contrast, Hertzka & Knowles discharged no one, conditioned no one's employment upon union membership or non-membership, and conducted no "industrial espionage." While the Law Judge found that Hertzka & Knowles interfered with the employees' free and uncoerced choice in the decertification election, he made no specific finding of hostility.[11]

Moreover, there is no finding nor is there indeed any showing that the decertification of OAE is linked to the creation of the committee system. While the latter followed the former, no causative effective is shown. *Post hoc ergo propter hoc* is neither good logic nor good law.[12] One

11. An employer is to be regarded as a "rightful contestant for his employees' loyalty in a union election." *Texas Industries v. NLRB,* 336 F.2d 128 at 130 (5th Cir. 1964); and see the cases to this end also at 336 F.2d 130.

12. *Tampa Times v. National Labor Relations Board,* 193 F.2d 582 (5th Cir. 1952).

may not say reasonably that *because* OAE was decertified in an election tainted by Section 8(a)(1) violations, the committee system is therefore violative of Section 8(a)(2).

For each of these propositions must stand upon its own evidentiary feet. The Circuit found that while the Section 8(a)(1) violations presented close questions, it would defer to the conclusions of the Law Judge upon the thesis that there was substantial evidence to support the findings.[13]

Since the Circuit did not, however, find substantial evidence to support the finding that Hertzka had violated Section 8(a)(2) (P. 13a), it could not enforce the fruit of that finding. We turn, then, to a brief examination of the substantial evidence requirement of Section 10(e), and its application to this case.

This Court has held that the "substantial evidence" clause of Section 10(e) of the Act means exactly what it says, viz., that Board findings shall be conclusive only if supported by substantial evidence. *Consolidated Edison Co. of New York v. National Labor Relations Board,* 305 U.S. 197 at 229. In *National Labor Relations Board v. Columbian Enameling & Stamping Co.,* 306 U.S. 292 at 299-300, the Court observed that the phrase equates with evidence affording a substantial basis of fact from which the fact in issue can reasonably be inferred, or, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and, finally, that kind of evidence which, if the trial were to a jury, would justify a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

The issue here, no matter in what mold it is cast by the Board, is whether the committee system at Hertzka sprang

13. "Again, although we are troubled by this finding, we think there is substantial evidence to support it" (P. 8a).

freely from the minds of the employees. The Law Judge, again, said the committee system was patterned after the SOM committee system and that it was adopted at a meeting called by management (P. 48a, 49a).

It is the uncontradicted testimony of the pr[illegible]or of the committee system that when he proposed the system he was not thinking of the SOM committee, but rather had in mind a proposal made by OAE during the course of its negotiations with Hertzka & Knowles (Tr. 216, Tr. 195-196). It is also uncontradicted that the meeting at which this proposal was made was requested by an employee (Tr. 276).

There are facts. One cannot get from those facts to the conclusions that the meeting was "called" by management[14] and that the committee system is patterned after the SOM scheme. Or if one does arrive at these conclusions he has not walked a path which can fairly be labelled "substantial evidence."

It is suggested in some cases that employee satisfaction or dissatisfaction with an independent union should be given considerable weight in determining the issue of domination *vel non.* The thesis is that if the employees think that they have not been well or faithfully represented by the independent union, then their choice of a successor is likely to be made with some care. See, for example, *Chicago Rawhide Manufacturing Co. v. National Labor Relations Board,* 221 F.2d 165 (7th Cir. 1955); *Coppus Engineering v. National Labor Relations Board,* 240 F.2d 564 (1st Cir. 1957); and *Modern Plastics v. National Labor Relations Board,* 379 F.2d 201 (6th Cir. 1967).

14. Since the meeting was asked for by an employee, a conclusion which states only that it was called by management is something less than the whole truth

This thesis, it seems to us, is nothing more than an explicit recognition of the underlying policy of the Act to protect "the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment . . ." This policy, found of course in Section 1, is echoed in Section 7 of the Act, in which it is established as a matter of right.[15]

Since employees *are* guaranteed the right to organize as they choose, some of the later cases have, and we think wisely, required a showing of actual domination rather than a possibility of domination.[16] This is no more than a requirement that interference with this right to organize must be proved by ". . . substantial evidence on the record considered as a whole." Illustrative cases are *National Labor Relations Board v. Post Publishing House,* 311 F.2d 565 (7th Cir. 1962); and *Chicago Rawhide Manufacturing Co., supra.*

It is *a fortiori* true that conduct which might constitute domination as to one person will have no effect upon another. This circumstance gives added validity to the proposition that actual domination must be shown, and raises, of course, the question of *how* it is to be shown. A number of courts have sensibly answered this question by determining the state of mind of the employees within the labor organization; if the organization exists as the result of a choice freely made, in their own interests, and freely represents the employees, it is not dominated, nor has the employees' right to organization been interfered with.[17] Cases in at least five circuits advance this view.[18]

15. It is true beyond peradventure that the Congress intended the Act as a grant of right to employees rather than as a grant of power to international unions. See *National Labor Relations Board v. Mid-States Metal Products, Inc.,* 403 F.2d 702 (5th Cir. 1968).

16. Section 8(a)(2) does not forbid the possibility of domination or interference.

It is sharply put in *Chicago Rawhide, supra,* at 221 F.2d 167:

> "The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees."

We urge that this school of thought is sound, and is even more compelling in the setting of this case. The employees involved here are architectural employees; they are professionals; they are sensitive, well-educated, and self-controlled enough to practice a demanding discipline. As the Circuit remarked, the committee system rather than a "formally organized union" is not unreasonable ". . . given the close contact that must exist between partners and professional associates in an architectural firm." (P. 13a).[19]

What the Board really wants here is the relegation of the Circuits to the role of a judicial echo of its findings. See *National Labor Relations Board v. Tri-State Casualty*

17. To put it another way, if credible evidence to those conclusions exists, there can be no substantial evidence on the record considered as a whole that the organization is dominated, or that the employees' right to organize has been interfered with.

18. *National Labor Relations Board v. Sharples Chemicals, Inc.,* 209 F.2d 645, 652 (6th Cir. 1954); *Independent Employers Association of Neptune Meter Co. v. National Labor Relations Board,* 158 F.2d 448, 450 (2nd Cir. 1946); *National Labor Relations Board v. Prince Macaroni Manufacturing Co.,* 329 F.2d 803, 811 (1st Cir. 1964); *National Labor Relations Board v. Wemyss,* 212 F.2d 465 (9th Cir. 1954); *Chicago Rawhide Manufacturing Co. v. National Labor Relations Board, supra* (7th Cir. 1955).

19. The thesis that the adversarial posture of labor relations is not necessary nor desirable in units of professionals or of well-educated employees is ably advanced in Note, *New Standards for Domination and Support Under Section 8(a)(2),* 82 Yale L.J. 510, 516-519.

Ins. Co., 188 F.2d 50, 53 (10th Cir. 1951); and *National Labor Relations Board v. Buddies Supermarket, Inc.*, 481 F.2d 714, 722 (5th Cir. 1973). But this is not what the Congress envisioned. Indeed, Section 10(e) of the original Act provided that ". . . the findings of the Board if supported by evidence, shall be . . . conclusive." Act of July 5, 1935, PL 198, 49 Stat. 455. The present language (Section 10(e) is now Section 10(f)) dates from June 23, 1947, PL 101, 61 Stat. 148. The reason—or at any rate a reason—for the change was Congressional concern that the courts had abdicated their traditional duty of the evaluation of evidence as either probative or illusory. See Report of Committee on Conference Home Report No. 510, June 3, 1947, p. 1135, at p. 1162, U.S. Code Congressional Service, 80th Congress, First Session; reprinted in 1 Legislative History 560.

We recognize, although with some dismay, that the Board is so long endowed with a quality of expertise that it is almost idle to attack that endowment. That expertise, however, does not reach the evaluation of evidence.

This is plain enough from *Universal Camera Corporation v. National Labor Relations Board*, 340 U.S. 474, 490, in which the Court observed that courts must assume responsibility for the "reasonableness and fairness of Labor Board decisions, and that reviewing courts must not abdicate the conventional judicial function." A reviewing court is not, this Court has said, barred from setting aside a Board decision when it cannot "conscientiously find that the evidence supporting that decision is substantial", when viewed in the light that the record in its entirety sheds upon the matter. *Universal Camera, supra*, at 340 U.S. 488.

CONCLUSION

This is simply one more case in which the Board has failed to support its findings by substantial evidence on the record as a whole. We urge that the Petition for a Writ of Certiorari should be denied.

Dated: August 18, 1975.

Respectfully submitted,

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Hertzka & Knowles

Of Counsel:
BROBECK, PHLEGER & HARRISON

Supreme Court, U. S.
FILED
SEP 10 1975

No. 75-22

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HERTZKA & KNOWLES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT H. BORK,
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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

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REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. Respondent contends that the court of appeals simply "did not * * * find no substantial evidence to support the [Board's] finding that Hertzka had violated Section 8(a)(2)" of the Act (Br. in Opp. 10), and that, under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, such an issue is not appropriate for further review. However, *Universal Camera* does not preclude review where the lower court's finding of lack of substantial evidence is predicated on an error of law. See *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378. That is the situation here. As shown in the petition (pp. 13-14), although it agreed with the Board that the Company had violated Section 8(a)(1) of the Act by threatening reprisals if the OAE were not rejected at the December 6 election, the court below failed to consider the significance of that finding on the domination charge

under Section 8(a)(2). Had the court considered the Company's prior 8(a)(1) conduct, it could not properly have upset the Board's finding that the committee system was not the voluntary preference of the employees. For, contrary to respondent's contention (Br. in Opp. 9-10), the cases cited at pp. 14-15 of the petition demonstrate that, where an organization like that here is selected on the heels of employer unfair labor practices directed against an "outside" union, it is reasonable for the Board to conclude that the former could not be the free choice of the employees.

2. There is no substance to respondent's quarrel with the Law Judge's findings, which the Board adopted and the court below did not disturb, that "the committee system was patterned after the SOM committee system and that it was adopted at a meeting called by management" (Br. in Opp. 11). Thus, whether or not the December 7 meeting was requested by an employee, Vice President Hanna did not so state when opening the meeting. Rather, consistent with his announcement of the previous day that he was calling a meeting where management was "going to put its money where its mouth was," he said that management was "seeking a dialogue" so that problems between management and employees could be resolved, and asked for "proposals or suggestions" as to how this could be accomplished (Pet. 5). And, regardless of what was specifically in the mind of the employee who proposed the committee system, that

system was similar in fact to the SOM system which had been suggested before the election as an alternative to the OAE.[1]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JOHN C. MILLER,
Acting General Counsel,
National Labor Relations Board.

SEPTEMBER 1975.

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[1]Contrary to respondent's implication (Br. in Opp. 11), the Law Judge did not find that employee Smith himself intended to copy the SOM proposal (Pet. App. 44a). His finding is instead based on the objective similarity of the two plans (Pet. App. 48a-49a, 51a) which the court of appeals also recognized (Pet. App. 9a, n. 13). Indeed, the quotation on p. 5 of our petition, to which respondent objects (Br. in Opp. 5), reflects this same recognition on the part of the other employees who voted on the plan. The quotation is from the testimony of employee John Klein who stated: "Then Dennis Smith proposed a committee structure similar to what they have at S.O.M. * * *" (Tr. 109).